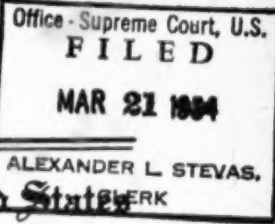


No. 83-1178



In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN AIR PARCEL FORWARDING COMPANY,
LTD. AND E.C. MCAFEE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of International Trade has jurisdiction under 28 U.S.C. (Supp. V) 1581(h) or (i) to entertain an action to enjoin the Customs Service from retroactively changing its method of assessing the value of certain dutiable goods.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A34) is reported at 718 F.2d 1546. The opinions of the Court of International Trade (Pet. App. A1-A20) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1983. The petition for a writ of certiorari was filed on January 12, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner American Air Parcel Forwarding Company (American Air), a freight consolidator, transports made-to-measure clothing produced in Hong Kong to this country and then has the apparel shipped to each ultimate purchaser (Pet. App. A22). Petitioner E.C. McAfee Co., a

customshouse broker, is the importer of record of the 12 import entries that are specifically listed as subjects of this suit (*ibid.*).

In early 1980, petitioner American Air queried the District Director of Customs in Detroit concerning the proper valuation for customs purposes of the apparel it was importing from Hong Kong, and it supplied to the Director what it deemed to be the pertinent information (Pet. App. A4). The District Director requested internal advice on this question from Customs Service headquarters pursuant to 19 C.F.R. 177.11 (Pet. App. A4). In the meantime, the 12 specified entries were made in Detroit for the account of American Air. American Air paid estimated duties based on what it considered to be the correct price, *i.e.*, the price paid to the tailors in Hong Kong (Pet. App. A3-A4). On October 17, 1980, the Customs Service ruled in favor of petitioners in a memorandum entitled "Export Value: Dutiability of Sales from Manufacturers to Distributors," C.S.D. 81-72 (TAA #10) (Pet. App. A3). The ruling stated that based on the information furnished by the importer, the Hong Kong sales price, as opposed to the price paid by consumers in the United States, was appropriate for assessing import value (*id.* at A3-A5). That ruling was affirmed in July 1981, pending further review of the underlying facts supplied by petitioners (*id.* at A4).

In August 1981, however, the Customs Office of Regulations and Rulings concluded that TAA #10 did not accurately reflect the realities of the made-to-measure industry (Pet. App. A4). That determination was incorporated in a telex order from Customs Service headquarters on September 9, 1981, directing field offices to require the assessment of import duties on the basis of the price paid by the United States consumer (*id.* at A5). Before implementing this order, the Customs Service did not notify the importers or provide interested parties with an opportunity to

comment on the proposed change (*id.* at 8). As a result of this interpretation, the 12 entries identified by petitioners were liquidated in November 1981 at values significantly in excess of the entered values (*id.* at A5-A6, A25).¹

2. On February 1, 1982, petitioners filed a protest with the Customs Service. Three days later, without paying the assessed duties or waiting for a response from the Service, petitioners commenced the instant action in the Court of International Trade under 28 U.S.C. (Supp. V) 1581(h) and (i) (Pet. App. A25). Asserting that the Service was required to follow the publication and notice requirements set out in 19 U.S.C. 1315(d) and 19 C.F.R. 177.10(c) before revoking TAA #10,² petitioners sought a preliminary injunction restraining the Customs Service from implementing the new ruling. The court initially granted the preliminary injunction (Pet. App. A1-A11). However, following the decision in *United States v. Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982), the court granted the government's motion to dismiss for lack of jurisdiction (Pet. App. A12-A20).

¹After paying the estimated duties, American Air released the goods into commerce. Thus, American Air collected money from its customers based on the estimated duties before the Customs Service imposed the higher charge. Petitioner contends that, as a practical matter, it cannot recoup any of that money from its customers and that consequently it has suffered irreparable financial harm (see Pet. App. A5-A6, A8-A9).

²The Customs Service maintains that publication and notice are not required under the applicable statute and regulation until after a uniform practice has been established. TAA #10, as an internal advice memorandum, did not automatically create a uniform and established practice. See *Hensel, Bruckmann & Lorbeer, Inc. v. United States*, 44 Cust. Ct. 722 (1960), *aff'd*, 49 C.C.P.A. 15 (1962); *Ditbro Pearl Co. v. United States*, 515 F.2d 1157 (C.C.P.A. 1975).

The court of appeals affirmed (Pet. App. A21-A34). It held that jurisdiction did not exist under 28 U.S.C. (Supp. V) 1581(i),³ the "residual" or "catch-all" jurisdictional provision for the Court of International Trade, because petitioners had by-passed the traditional method of obtaining review under 28 U.S.C. (Supp. V) 1581(a), *i.e.*, filing a protest and, if the protest is denied, paying the duty (Pet. App. A26-A30).⁴ The court of appeals also held that jurisdiction was not available under 28 U.S.C. (Supp. V) 1581(h), which provides jurisdiction for certain declaratory judgment actions brought prior to importation of the goods at issue (Pet. App. A31-A33).

³28 U.S.C. (Supp. V) 1581(i) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

⁴28 U.S.C. (Supp. V) 1581(a) provides that the "Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." In turn, 28 U.S.C. (Supp. V) 2637(a) provides: "A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges or exactions have been paid at the time the action is commenced * * *."

ARGUMENT

Petitioners erroneously contend (Pet. 16-19) that the Court of International Trade had jurisdiction to entertain their action under 28 U.S.C. (Supp. V) 1581(h) and (i).

1. In enacting Section 1581(i), Congress clearly did not intend to abrogate its long-standing policy requiring importers who are dissatisfied with the customs duties levied upon their goods to pay the duties before invoking judicial review. As the court of appeals stated in *United States v. Uniroyal, Inc.*, 687 F.2d at 471, "the legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." The protest procedure ensures that funds are available to pay the duty, and it implements the congressional directive that the "importer should not be entitled to retain the use of additional duties determined to be due while court proceedings continue over possibly lengthy periods of time." *Dynasty Footwear v. United States*, 551 F. Supp. 1138, 1141 (Ct. Int'l Trade 1982) (quoting *Hearings on S. 2624 Before Subcomm. No 3 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 229 (1970)). The "residual jurisdiction" provision is therefore applicable only if the other provisions for administrative relief are not available.

Furthermore, petitioners have not offered any compelling reason for not paying the assessed duties prior to obtaining judicial review. In the first place, allegations of financial hardship have never sufficed to circumvent the prepayment requirement of Section 1581(a), which is an important part of the congressional scheme. *Jerlin Watch Co. v. United States Dep't of Commerce*, 597 F.2d 687, 691-692 (9th Cir. 1979); *Lowa, Ltd. v. United States*, 561

F. Supp. 441 (Ct. Int'l Trade 1983) (showing of financial need not sufficient to circumvent the Section 1581(a) requirement), aff'd, No. 83-1018 (Fed. Cir. Jan. 4, 1984). In addition, as the court of appeals noted (Pet. App. A29), petitioners could have avoided their present difficulties by obtaining pre-importation review of the valuation of the merchandise under 28 U.S.C. (Supp. V) 1581(h). Accordingly, "[t]heir plight cannot be attributed to deficiencies in the statute" (Pet. App. A29). Petitioners' suggestion (Pet. 24) that the Customs Service would have violated a declaratory judgment entered in such a suit is wholly unfounded.

Moreover, following the route specified in Section 1581(a) would not cause undue delay. Under 19 C.F.R. 174.22, litigants may request expedited disposition 90 days after filing a protest. If the Customs Service does not act upon that request within the ensuing 30 days, the litigant may immediately file for review in the Court of International Trade. Thus, contrary to petitioners' allegations, Section 1581(a) provides a prompt, efficacious remedy for the purported injury they suffered. Petitioners, however, chose to bypass that alternative and file directly in court.

Nor is there any merit to petitioners' suggestion (Pet. 11-12) that this case is analogous to *Mathews v. Eldridge*, 424 U.S. 319 (1976). In that case, the Court permitted a Social Security disability claimant to litigate whether a pre-termination hearing was mandated by due process before exhausting the post-termination procedures established by the Secretary. That decision rested upon the determination that otherwise the claimant could not have obtained full relief. Here, as noted, petitioners could have obtained pre-importation review, as well as expeditious review under Section 1581(i) after pursuing the protest

procedure.⁵ *Eldridge* does not support petitioners' claimed right to review at some intermediate point.

2. Petitioners' argument that jurisdiction exists under Section 1581(h) is likewise incorrect.

First, as the court of appeals correctly held (Pet. App. A32-A33), petitioners could not prove, as required by Section 1581(h), that they "would be irreparably harmed unless given an opportunity to obtain judicial review prior to * * * importation." An action under Section 1581(h) would not affect the duties on goods already imported. See Pet. App. A33 & n.5. And revocation of TAA # 10 will not cause petitioners irreparable harm with respect to goods imported in the future because petitioners can take the increased duties into account in billing customers.

Second, Section 1581(h) permits review of certain "ruling[s]" of the Secretary of the Treasury or his refusal to issue such rulings. That provision does not apply to a request for internal advice. As stated in the House Report (H.R. Rep. 96-1235, 96th Cong., 2d Sess. 46 (1980)), "[t]he word 'ruling' is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction. In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review', both of which relate to completed import transactions."

⁵Petitioners have paid the duty for at least one entry and have filed a new action in the Court of International Trade. See *American Air Parcel Forwarding Co. v. United States*, No. 83-7-00995 (Ct. Int'l Trade Sept. 20, 1983) (permitting petitioners to maintain action after denial of protest and payment of the assessed duty on one of the specified entries). In addition, American Air's customers have also filed suits covering some of the entries specified in the instant action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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